IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

ASSOCIATED BUILDERS
AND CONTRACTORS,

Plaintiff-Appellant,

v Docket No. 149622

CITY OF LANSING,

Defendant-Appellee.
_____/

Brief on Appeal of Defendant-Appellee

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE/STATEMENT REGARDING E-SERVICE

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JURISDICTIONAL STATEMENT

The circuit court's judgment in favor of the plaintiff and against the defendant was entered on November 16, 2012. On December 5, 2012, defendant filed its Claim of Appeal in the Court of Appeals. On May 27, 2014 the Court of Appeals issued its Opinion reversing the circuit court's judgment and remanding the case to the circuit court. On July 8, 2014 plaintiff filed its Application for Leave to Appeal to this Court. On December 10, 2014 this Court granted the Application for Leave to Appeal. This Court has exercised jurisdiction under MCR 7.301(A)(2).

COUNTER-STATEMENT OF THE QUESTIONS INVOLVED

I. Whether ***Attorney General, ex rel. Lennane v City of Detroit*****,** 225 Mich 631 (1923), should be overruled?

II. What authority, if any, enabled defendant to enact its prevailing wage ordinance?

COUNTER-STATEMENT OF FACTS

The plaintiff's Statement of Facts is accurate up to the point it quotes the City of Lansing's Prevailing Wage Ordinance. After that point the Statement of Facts ceases to be "fairly stated without argument or bias." MCR 7.306(A); MCR 7.212(C)(6), and consists of pure argument.

STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision regarding a motion for summary disposition. *Petipren v Jaskowski*, 494 Mich 190, 201, 833 NW2d 247 (2013).

SUMMARY OF ARGUMENT

Attorney General ex rel Lennane v City of Detroit, 225 Mich 631, 196 NW 391 (1923), must be overruled. The standards for overruling precedent under the doctrine of stare decisis most recently discussed in *People v Tanner*, 496 Mich 199, 853 NW2d 653 (2014), have been met. *Lennane* was incorrectly decided as it ignored longstanding Supreme Court precedent on the authority of municipalities vis a vis the state. *Lennane* was an unprecedented restriction of the authority of municipalities to act in matters of local concern. See, *People ex rel Le Roy v Hurlbut*, 24 Mich 44 (1871); *Churchill v Common Council of City of Detroit*, 153 Mich 93, 94, 116 NW 558 (1908); *Simpson v Gage*, 195 Mich 581, 588, 161 NW 898 (1917). *Lennane* is an outlier in this Court's jurisprudence, as its rationale has been repeatedly repudiated by this Court since it was decided. See, *1426 Woodward Ave Corp v Wolff*, 312 Mich 352, 20 NW2d 217 (1945); *Rental Property Owners Association of Kent County v City of Grand Rapids*, 455 Mich 246, 566 NW2d 514 (1997)

Lennane also erroneously held that a city ordinance instituting a prevailing wage standard only applicable to those that contracted with the city was an unconstitutional attempt to set state policy. The city's action was not an attempt to set state policy but was a proper exercise of authority over a matter of local concern. See, *Burton v. City of Detroit*, 190 Mich. 195, 156 N.W. 453 (1916); *People ex rel Bd of Detroit Park Comm'rs*

v Detroit Common Council, 28 Mich 228, 230 (1873); *McNeil v Charlevoix County*, 275 Mich App 686, 741 NW2d 27 (2007) *aff'd,* 484 Mich 69, 772 NW2d 18 (2009).

Lennane defies practical workability. If *Lennane* is resurrected and its holding applied, the result would be chaos. This is not simply an issue of addressing a prevailing wage enactment in a vacuum. *Lennane* held that Detroit's prevailing wage provision was an attempt to set state policy. If a prevailing wage ordinance is an attempt to set state policy, what local economic regulation is not? If Lansing's prevailing wage ordinance is infirm under the *Lennane* holding, what local economic regulation would survive? The inescapable answer would appear to be "none."

There has been no reliance on *Lennane* to the extent anyone would have to fundamentally alter their behavior if *Lennane* were overruled. There would be no "real-world dislocations" if *Lennane* ceased to exist. This is unequivocally demonstrated in two ways. First, there would be virtually no change in the manner in which contractors do business. Both the United States and the State of Michigan have prevailing wage statutes currently in place: The Davis-Bacon Act, 40 USC § 3141 *et seq*, and the Michigan Prevailing Wage Act, MCL 408.551 *et seq.* Since the Michigan statute incorporates the U.S. Department of Labor's standards for determining the "prevailing wage," and since the Lansing ordinance also relies on the Department of Labor standards, it is difficult to conceive of the practical hardship ABC claims would result from compliance with the City of Lansing ordinance.

The other reason we can confidently say the existence of a local prevailing wage ordinance would not result in widespread chaos and the disintegration of the construction

industry is this: at least seven other local prevailing wage ordinances are currently in effect.

Changes to the 1963 Constitution no longer justify *Lennane's* holding. Constitution 1963, art 7, § 22 is the Michigan Constitution's counterpart to the Tenth Amendment of the United States Constitution which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Just as the Tenth Amendment reserved to the states all authority not ceded to the federal government or explicitly prohibited to the states by the Constitution. So too, art 7, § 22 reserves to the cities all powers not explicitly prohibited. There is nothing in the Constitution or state statutes that prohibits cities from enacting a prevailing wage ordinance. Additionally, Constitution 1963, art 7, § 34, requires the constitution and laws concerning cities be liberally construed. This Court made that very point in *Rental Property Owners Association of Kent County v City of Grand Rapids*, 455 Mich 246, 566 NW2d 514 (1997).

The city had authority to enact the prevailing wage ordinance under its constitutional and statutory authority. This Court has explicitly held "[t]he home rule city act is intended to give cities a large measure of home rule. It grants general rights and powers ***subject to enumerated restrictions***." *Rental Property Owners Association, supra,* at 254 (Emphasis added). Further, in *Detroit v Walker,* 445 Mich 682, 690, 520 NW2d 135 (1994) and *American Federation of State, County & Municipal Employees v City of Detroit*, 468 Mich 388, 410-411, 662 NW2d 695 (2003), this Court unequivocally held the expansive police powers possessed by this state's municipalities. "Home rule cities

enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied." There can be no question the prevailing wage ordinance is within the purview of the police power. Moreover, the ordinance does not conflict with state law on the subject.

I. ATTORNEY GENERAL ex rel LENNANE v CITY OF DETROIT SHOULD BE OVERRULED.

The first question the Court directed the parties to address is whether *Attorney General ex rel Lennane v City of Detroit* should be overruled. It is the defendant's position that this Court's decisions after *Lennane* and revisions to the 1963 Constitution have already accomplished an overruling in practicality. As a result, this Court should formally over *Lennane*.

A. The Doctrine of Stare Decisis.

This Court recently discussed the doctrine of stare decisis, and its application, in *People v Tanner*, 496 Mich 199, 853 NW2d 653 (2014). This Court acknowledged the application of stare decisis is "'generally the preferred course, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' *Robinson v Detroit,* 462 Mich 439, 463, 613 NW2d 307 (2000), quoting *Hohn v United States,* 524 US 236, 251, 118 S Ct 1969, 141 L Ed 2d 242 (1998). However, 'stare decisis is a principle of policy rather than an inexorable command, and ... the Court is not constrained to follow precedent when governing decisions are unworkable or are badly

reasoned.' *Robinson,* 462 Mich at 464" *People v Tanner, supra*, 496 Mich at 250. (Internal quotation marks omitted).

This Court went on to explain that when performing a stare decisis analysis, the Court should review these factors: "'whether the decision at issue defies 'practical workability,' whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision.' *Robinson,* 462 Mich at 464 (citation omitted). As for the reliance interest, 'the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations.' *Id.* at 466." *People v Tanner*, 496 Mich at 250-251.

Finally, this Court reiterated the long-standing rule that when questions before the Court implicate the Constitution, the Court has an even greater obligation to overrule erroneous precedent. "'[A] judicial tribunal is most strongly justified in reversal of its precedent when adherence to such precedent would perpetuate a plainly incorrect interpretation of the language of a constitutional provision or statute.' *Nawrocki v Macomb County Rd. Comm.,* 463 Mich 143, 181, 615 NW2d 702 (2000), citing *Robinson,* 462 Mich at 463-468. This is because 'the policy of stare decisis 'is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.'" *Kyser v Kasson Twp,* 486 Mich 514, 534, n 15, 786 N.W.2d 543 (2010), quoting *Agostini v Felton,* 521 US 203, 235, 117 S Ct 1997, 138 L Ed 2d 391 (1997). Thus, it is 'our duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into

question.' *Robinson,* 462 Mich at 464, quoting *Mitchell v W T Grant Co.,* 416 US 600, 627-628, 94 S Ct 1895, 40 L Ed 2d 406 (1974) (Powell, J., concurring)." After applying these standards it is evident *Lennane* must be overruled.

B. The *Lennane* Holding.

Attorney General ex rel Lennane v City of Detroit, 225 Mich 631, 196 NW 391 (1923), was initiated by the Michigan Attorney General who brought suit to restrain the City of Detroit from enforcing the provisions of its Charter entitled "Minimum Wage," and of a city ordinance enacted to enforce the Charter provision.

The first four sections of the Charter provision in question actually consisted of several regulations regarding city employees' working conditions. Section 5 applied to any contractor that contracted with the city to perform work *for* the city.

> No contract for any public work shall be let which shall not, as a part of the specification on which contractors shall make their bids, require contractor or subcontractor to pay all persons in his employ doing common labor and engaged in the public work contracted for not less than two dollars and twenty-five cents per diem, to pay all persons in his employ doing the work of a skilled mechanic and engaged on the public work the highest prevailing wage in that particular grade of work, and to require of such employees the same service day and service week required herein of all city employees.

Id. at 634. The Court held the Charter provision and ordinance constituted an invalid exercise of municipal authority.

C. The *Lennane* Rationale.

The Court in *Lennane* relied on a number of different rationales in holding the Detroit charter provision and ordinance unconstitutional. As will be shown, the rationales

identified by the Court were a significant departure from prior Michigan Supreme Court doctrine. Moreover, it appears *Lennane* and a few other cases decided in the same time frame are the real outliers in this Court's jurisprudence, as the rationales announced by *Lennane* have been repeatedly repudiated by this Court both under the 1908 Constitution and under the 1963 Constitution. Additionally, the cases relied on by the *Lennane* Court to support the holding do not, in fact, support.

1. The Constitutional Authority of Municipalities.

The *Lennane* Court made observations that questioned the authority of municipalities in a manner that was antithetical to the state's jurisprudence up to that time period. First, the Court stated: "Without deciding but assuming for the purposes of the case, that the city may fix a public policy applicable to its matters of local and municipal concern . . ." *Id* at 636. The Court then quoted the following dicta from *City of Kalamazoo v Titus*, 208 Mich 252, 260-261, 175 NW 480 (1919):

> The charter provision, the ordinance, the argument made for the city, indeed, the suit itself, reflect a popular interest in, and, we conceive, a popular misunderstanding about, the subject of home rule, so called, in cities. There is apparent a widely spread notion that lately, in some way, cities have become possessed of greatly enlarged powers, the right to exercise which may come from mere assertion of their existence and the purpose to exercise them.

Lennane, supra, at 639. Finally, the Court stated: "If we assume, as we have, for the purposes of the case, without deciding, the question that the city possesses such of the police power of the state as may be necessary to permit it to legislate upon matters of municipal concern . . ." *Id* at 641.

It would have been quite surprising to the Supreme Court justices serving on the Court immediately before and in the decade after the ratification of the 1908 Constitution that there was a need to "assume without deciding" the authority of municipalities to legislate on matters of municipal concern.

In the mid-1800s and beyond most states applied what has become known as "Dillon's Rule." Dillon's Rule is derived from decisions issued by Justice John F. Dillon of the Iowa Supreme Court in 1868. The rule affirms the narrow interpretation of a local government's authority, in which a sub-state government may engage in an activity only if it is specifically sanctioned by the state government. http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority In Michigan, however, Dillon's Rule had not been embraced. Chief Justice Campbell wrote in *People ex rel Le Roy v Hurlbut*, 24 Mich 44 (1871):

> We must never forget, in studying [the constitution's] terms, that most of them had a settled meaning before its adoption. Instead of being the source of our laws and liberties, it is, in the main, no more than a recognition and re-enactment of an accepted system. ***The rights preserved are ancient rights, and the municipal bodies recognized in it, and required to be perpetuated, were already existing, with known elements and functions***. They were not towns or counties or cities or villages, in the abstract--or municipalities which had lost all their old liberties by central usurpation--but American and Michigan municipalities of common-law origin, and having no less than common-law franchises. So far as any indication can be found, in the constitution of 1850, that they were to be changed in any substantial way, ***the change indicated is in the direction of increased freedom of local action, and a decrease in the power of the state to interfere with local management.***

Id. at 87. (Emphasis added). Chief Justice Campbell went on explain the significance of the revisions to the state Constitution from the original Constitution of 1835:

> Having enjoined it upon the legislature to "provide for the incorporation and organization of cities and villages" (*Art. XIV,* § *13*), ***a clause was inserted for the express purpose of removing doubts on a controverted question authorizing the legislature to confer upon townships, cities, and incorporated villages, and on boards of supervisors, such powers of a local legislative and administrative character as they may deem proper***: *Art. IV,* § *38.* And there are many other clauses which assume that such powers will be given. (Emphasis added).

Id. at 87-88. (Emphasis added). Chief Justice Campbell then pointedly stated: "Our constitution cannot be understood or carried out at all, except on ***the theory of local self-government; and the intention to preserve it is quite apparent***." *Id.* at 89. (Emphasis added).

Justice Cooley also wrote extensively in *Hurlbut* about the right of self-governance possessed by the citizens of the municipalities of Michigan. He began by posing the question at issue:

> We have before us a legislative act creating for the city of Detroit a new board, which is to exercise a considerable share of the authority usually possessed by officers locally chosen; to have general charge of the city buildings, property and local conveniences, to make contracts for public works on behalf of the city, and to do many things of a legislative character which generally the common council of cities alone is authorized to do. ***The legislature has created this board, and it has appointed its members; and both the one and the other have been done under a claim of right which, unless I wholly misunderstand it, would justify that body in taking to itself the entire and exclusive government of the city***, and the appointment of all its officers, excepting only the judicial, for which, by the constitution, other provision is expressly made. And the question, broadly

> and nakedly stated, can be nothing short of this: ***Whether local self-government in this state is or is not a mere privilege, conceded by the legislature in its discretion, and which may be withdrawn at any time at pleasure?***

Id. at 95-96. (Emphasis added). In answering the question with an unequivocal negative response, and in rejecting the Dillon's Rule in Michigan, Justice Cooley explained:

> The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether.

Id. at 97. Finally, in a simple, but powerful statement Justice Cooley explained the importance of municipal self-governance. "The circumstances from which these implications arise are: *First,* that the constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, *second,* that the liberties of the people have generally been supposed to spring from, and be dependent upon that system." *Id.*

This view was unchallenged throughout the early 1900s. In *Village of Jonesville v S Michigan Tel Co*, 155 Mich 86, 118 N.W. 736 (1908), this Court recognized the "inherent police power" of a municipality to prohibit the placement of telephone poles along a certain street in the village. "Where a municipality, in the exercise of its inherent

police power, adopts an ordinance reasonably regulating the manner, character, or place of construction of a contemplated line, the telephone company must comply with such regulations and exercise its right of entry under the general powers conferred by the state subject to them." *Id* at 90.

In *Churchill v Common Council of City of Detroit*, 153 Mich 93, 94, 116 NW 558 (1908) this Court upheld a city zoning ordinance that restricted the location of saloons under the city's police power authority. In affirming the city's authority to create zoning districts this Court held: "In the charter of Detroit the power to regulate is conferred upon the common council. The power to regulate has been defined as meaning 'to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws.' 'The term is one of broad import.' 'A power to regulate does not properly include a power to suppress or prohibit, for the very essence of regulation is the existence of something to be regulated; but ***the power to regulate a business, trade, etc., authorizes a municipality to confine the exercise of such business to certain localities***, to certain hours of the day,' etc. 24 Am. & Eng. Ency. of Law (2d Ed.) p. 243." *Id* at 95. (Emphasis added).

In *City of Detroit v Detroit United Ry*, 172 Mich 136, 137 NW 645 (1912) *aff'd,* 229 US 39, 33 S Ct 697, 57 L Ed 1056 (1913), this Court stated: "The principle of local self-government has always been fostered in this state and upheld by this court. While the Legislature, in establishing the Michigan Railroad Commission and fixing its powers, has given it certain specified rights relative to certain street railroads and interurban railways, ***yet it is evident from the particular legislation referred to that there was no legislative***

intent to reject the established policy of maintaining local self-government, and to institute a new policy in derogation thereof." *Id* at 157. (Emphasis added).

Simpson v Gage, 195 Mich 581, 588, 161 NW 898 (1917), addressed a statute enacted by the Legislature, Act No. 81, Pub. Acts 1915, that required all cities in the state with full time firefighters to provide them with a paid leave of absence of one day for every four days worked and a paid furlough of twenty days once in each year.

In August 1915 plaintiff and fifty other full time firefighters in the City of Saginaw presented a petition to the city council requesting the act be put into effect as soon as possible. A recommendation was then made that, because no money was available from the original appropriation of the salary item of the fire department fund, the Board of Estimates be requested to authorize an additional appropriation of $5,000.00 for the purpose of implementing the provisions of the act and transferring the $5,000.00 from contingent fund. The Board of Estimates refused to add the recommended appropriation of $5,000 to the fire department fund. *Id*. at 583-584.

Plaintiff then demanded the mayor put the act into effect and grant plaintiff as one of the full-paid members of the fire department the paid leaves described in the statute. When the mayor refused the request, plaintiff filed a petition with the circuit court of Saginaw County for an order to compel compliance. In denying the plaintiff's motion the circuit court ruled:

"My conclusion is that the act in question is a violation of the right of the city to local self-government, and that, if the province of the board of estimates to determine the number and compensation of the employees for any department of the city government

can be abrogated by this act, the Legislature may be successive acts of this kind abrogate altogether, by piecemeal, all of the authority of the board of estimates." *Id* at 584.

This Court affirmed the circuit court's ruling. This Court held began its discussion by stating:

> [W]e agree with the trial court that the more important and controlling issue urged in behalf of the city is the validity of said Act 81, which is attacked as unconstitutional and void for various reasons, amongst which are: That it is palpably a local and special act which interferes with a matter of purely local self-government in which the state at large has no direct interest, abridges the right of the city to contract, and denies it equal protection under the law, is capricious and unreasonable class legislation, and that ***under the provision of article 8 of the Constitution state legislation in reference to cities incorporated under the home rule act of 1909 is prohibited in matters of purely municipal concern***, except through or by amendment of such general law.

Id at 585-586. (Emphasis added). The Court then stated: "It may be first noted as well settled that a city's fire department is distinctly a matter which concerns the inhabitants of the city as an organized community apart from the people of the state at large, peculiarly within the field of municipal activity and local self-government." *Id* at 586. In striking down the statute this Court held:

> But, aside from these infirmities, the act as framed bears the brand of special legislation in the interest of those it directly benefits, rather than a beneficent general law in the public interest enacted under a legitimate exercise of police power for the general welfare of the people throughout the state at large, ***and is a palpable attempt to regulate the internal affairs of cities, amounting to an unwarranted interference with their rights of local self-government under those principles declared upon that subject in People v. Hurlbut and Davidson v. Hine, supra, since recognized, emphasized, and enlarged in article 8 of our latest Constitution***.

Id at 588. (Emphasis added).

Thus, nine years after the ratification of the 1908 Constitution, this Court relied on Article VIII of the Constitution to strike down a state statute that, by its terms, applied to every city in the state and sought to regulate the working hours of all full time firefighters in the state. This Court found the Legislature's attempt to be an unwarranted interference with the rights of local self-governance.

Wattles v Upjohn, 211 Mich 514, 179 NW 335 (1920), discussed the revisions in the 1908 Constitution regarding municipalities: "Our present Constitution of 1908 is for the most part, as sometimes called, a revision of the former Constitution of 1850, which it follows closely in letter and spirit, the chief alterations relating to the manner of amending the Constitution, adapting it to certain changed conditions general throughout the state, ***and giving increased power to political subdivisions in matters of strictly local concern***. Six of the seven new sections in article 8 relating to cities and villages authorize and direct legislation by a general law conferring upon them autonomy as fully as seemed consistent with the established fundamental principles of state government, the seventh and last briefly stating a few limitations beyond which they could not go; . . ." *Id* at 530-531. (Emphasis added).

In point of fact, most of the cases brought before the Supreme Court during this timeframe involving the authority of the state vis a vis the municipalities were to decide to what extent the state could exercise authority over the municipality. For example, in *Jewel Theater Co v Winship*, 178 Mich 399, 144 NW 835 (1914), the Court was required to determine if a state statute requiring theater performances to take place on the ground

floor of a building was applicable to a theater in the City of Detroit. In holding that it was, the Court pointed out the Act's "provisions do not conflict with the local regulation to which attention has been called, and the act is a valid exercise of the police power of the state." *Id*. at 404. The Court's affirmative statement that the state statute did not conflict with any local regulation is significant. It suggests the statute would have been unenforceable if such a conflict had existed. The Court then reiterated this point:

> [The Act] does not conflict with the local regulation, but goes further. It disturbs what the local regulation does not disturb, namely, moving picture shows conducted on floors of buildings above the first floor. The local regulation is not abrogated, but is supplemented. The local regulation conferred upon complainant no right to give such exhibitions on the second floor of a building. It did not disturb it there. . . If the public safety or welfare demands that a particular business shall not be conducted in a particular place, the legislative power may be exercised to prevent it.

Id at 404-405.

In *Wood v City of Detroit*, 188 Mich 547, 155 NW 592 (1915), the City of Detroit challenged the ability of the state to apply the original Workers' Compensation Act to a city employee. In March 1914, an employee of the Public Lighting Commission of the City of Detroit was killed in the course of his employment. The Industrial Accident Board (the original iteration of the Workers' Compensation Bureau) affirmed an award to a member of the decedent's family. The award was made under the provisions of Act No. 10 of the Public Acts of the Extra Session of 1912, the original Workers' Compensation Act.

The City of Detroit contended it was unconstitutional to apply the act to the City. It argued that in enacting the Home Rule Act the Legislature exhausted its powers over

the City and could not further affect municipal affairs as it has assumed to do by passing the act at issue. Significantly, the Supreme Court began its analysis by discussing the affect the Constitution of 1908 had on the relationship between the state and municipalities. This Court noted the new Constitution "has pointed out the extent of the local powers and capacities of cities and villages with more precision than was done in former Constitutions, ***thus restricting the power of the Legislature to grant or to deny to particular communities the enumerated capacities and powers, at will***, but it has not abolished all distinctions between municipal and other corporations and individuals with respect to the exercise of the powers conferred nor denied the power of the Legislature to enact general laws applicable to cities." *Id* at 558-559. (Emphasis added).

In holding the City was subject to the act, the Court reiterated the Legislature retained the right to legislate on behalf of all citizens of the state. "The subject of the legislation which is in question here is a social subject, in its very nature referable for community action to the state itself. A social theory needed to be crystallized into law. ***Its nature was such that no community less than the state could be appealed to for this purpose***. . ." *Id* at 560. (Emphasis added).

Today, the idea there could even be a debate over whether the Legislature has the authority to subject municipalities to a statute such as the Workers' Compensation Act is startling. Any attorney who would file a challenge on behalf of a municipality, such as the one filed on behalf of the City of Detroit, would doubtless be subject to sanctions for filing a document that was not warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law. MCR 2.114(D)(2). However, one

hundred years ago the legal relationship between the state and municipalities was on a far different footing. The idea that municipalities were not subject to regulation by state legislation, or at least were subject only to minimal regulation, was a mainstream view.

This view was continued in *Thomas v Bd of Supervisors of Wayne County*, 214 Mich 72, 182 NW 417 (1921), where suit was brought by taxpayers of Wayne County contesting the right or power of the county to establish and maintain a tract index and to make and furnish abstracts of title to lands in that county. *Id*. at 74-75. In rejecting the challenge the Supreme Court first held the furnishing of the abstracts was purely a matter of local concern:

> For the convenience of the owners and prospective purchasers of lands in the county, may not the board of supervisors provide for furnishing the information desired as to these special matters***? It is purely a matter of local concern. Neither the state as a whole nor any person other than a taxpayer of Wayne county has any interest in the matter.*** The county having lawfully expended a large sum in the preparation of the tract index, may it not provide for giving its people the benefit of such expenditure by furnishing them the information desired in the form proposed? We so conclude.

Id. at 84. (Emphasis added).

These cases are merely representative of the prevailing view of the authority of municipalities in Michigan in the early twentieth century. Additional cases from this Court recognizing the same authority are legion. This view is best summed up by Chief Justice Campbell in *Hurlbut*: "Our constitution cannot be understood or carried out at all, except on the theory of local self-government; and the intention to preserve it is quite apparent." *Hurlbut, supra,* at 89.

The language from *Lennane* questioning the authority of municipalities, and suggesting it was an undecided question was simply wrong. That language ignored scores of cases that unequivocally held otherwise. It is not possible to reconcile the holding of *Simpson v Gage, supra*, decided in 1917, with the holding in *Lennane*, decided five years later in 1923.

The defendant will note two points of historical interest. Eight justices sat on the Michigan Supreme Court during the time both *Simpson* and *Lennane* were decided. Of the eight justices who were sitting when *Simpson* was decided, Chief Justice Kuhn and Justices Ostrander, Brooke, Moore, Fellows, Bird, Stone and Steere, only four were on the Court when *Lennane* was decided – Moore, Fellows, Bird and Steere. Justices Kuhn, Ostrander, Brooke and Stone had been replaced by Justices Wiest, Sharpe, Clark and McDonald. A change in the personnel on the Court might not account for the drastic change of course chartered by *Lennane.* On the other hand, it would not be the only time that the change of personnel on a court resulted in change to longstanding doctrines.

The other point that should not be ignored is that the early 1920s were the acme of the so-called *Lochner* era, when the United States Supreme Court was invalidating state attempts to regulate in the area of labor and economic transactions under the aegis of the police power as being unconstitutional infringements on economic liberty interests. It was inevitable the attitude of the United States Supreme Court would ultimately influence the state courts. Again, whether that was part of the motivation for the departure from longstanding doctrine is unknown – but it is certainly plausible.

The erroneous holding in *Lennane* is made even clearer by the holdings of this Court that came after the decision. The doctrine that had been recognized before *Lennane* was resurrected. In *1426 Woodward Ave Corp v Wolff*, 312 Mich 352, 20 NW2d 217 (1945), this Court explicitly addressed the issue: "Nor do we need to follow earlier cases involving restrictions on the power of cities, antedating the home rule amendment to the Constitution and legislation to effectuate its intent. The home rule act should be construed 'liberally and in a home rule spirit.' *City Commission of Jackson v Hirschman*, 253 Mich 596, 599, 235 NW 265." *Id* at 369.

2. Matters of Local Concern vs. Matters of State Concern.

Another rationale identified by the *Lennane* Court for invalidating the Detroit charter provision and ordinance was the Court's finding that the local enactments constituted an attempt to set state policy. "While the municipality in the performance of certain of its functions acts as agent of the state it may not as such agent fix for the state its public policy. That power has not been delegated to these agents of the state." *Lennane, supra*, at 638. The Court went on to state: "In the provisions under consideration the city has undertaken to exercise the police power not only over matters of municipal concern, but also over matters of state concern; it has undertaken not only to fix a public policy for its activities which are purely local but also for its activities as an arm of the state. The provisions apply alike to local activities and state activities." *Id* at 640-641.

The *Lennane* Court did not undertake any analysis in reaching its conclusion – it simply pronounced that a city enactment setting a prevailing wage standard for those who

contract to do work for the city was an attempt to fix public policy for the state. This conclusion is erroneous and does not withstand even modest scrutiny.

It is imperative to understand what the Detroit provisions did and did not do. The provisions applied *only* to those that entered into contracts with the city to perform work for the city. The provisions did not apply to businesses located within the City of Detroit who did not do work for the city. These were not regulations of a general nature that had any application to anyone other than those who contracted to do work for the city. With that understanding, it is impossible to conclude the city was attempting to fix state policy. The analysis the *Lennane* Court used in reaching its conclusion cannot be scrutinized because none is offered. However, the conclusion cannot be justified.

Burton v. City of Detroit, 190 Mich. 195, 156 N.W. 453 (1916), is perhaps the closest case on point, as it dealt with the authority of a city to make decisions regarding the expenditure of its own funds. The city passed an ordinance to pay certain city employees more than the amount specified in the original charter provision. Plaintiff was the owner of real estate in the city of Detroit subject to taxation who sought to enjoin the payment and disbursement by the city of the excess amounts, which he claimed was not authorized by law. *Id*.

In rejecting the plaintiff's claim this Court held the payment of city employees is a matter of local concern:

> It does not seem, in our opinion, that there can be any doubt that, under the provisions of the charter itself (section 166, C. *206 1904), the 'home rule' clause of the Constitution (section 21, art. 8), and the Home Rule Act (Act 279, P. A. 1909, as amended), the common council had a right to legislate

> as to the salaries of its officers, their subordinates and employees. . . . If the electors of the city of Detroit so desire, they may extend the limitations on this power which the council now possesses, and further restrict the power of the council to act with reference to salaries, as was done by the amendment of 1914.

Id at 205-206.

There is no meaningful difference between the authority of the municipality in *Burton* and the authority to require contractors with whom a municipality does business to pay its employees prevailing wages. Indeed, Mr. Burton would have suffered more of loss by paying a few cents more a year in taxes that any of plaintiff's members will sustain if the City of Lansing's ordinance is upheld. Ultimately, it is the municipality that will pay any increased cost. A bidder will factor in the increased cost of labor when submitting its bid. The successful bidder is not going to be forced to bear the cost of the prevailing wage requirement.

Essentially, plaintiff's argument is the prevailing wage ordinance is bad policy. That is not a position plaintiff can vindicate through this litigation. It is also not a position this Court should pass judgment on. *Chicago, D & CGTJR Co v Simons*, 210 Mich 418, 423, 178 NW 12 (1920) ("It is not our province to discuss the wisdom and policy of such legislation. This belongs solely to the legislative department, whose enactments it is our duty to expound, in accordance with the expressed will of the Legislature."); *C F Smith Co v Fitzgerald*, 270 Mich 659, 671, 259 NW 352 (1935) ("The court may not substitute the personal views and ideas of its members for the wisdom and policy of the Legislature. Courts have nothing to do with the policy of legislation nor the economic ideals involved

nor do they constitute a harbor of refuge from ill-advised, unjust, or impolitic legislation."); *Bonner v City of Brighton*, 495 Mich 209, 234, 848 NW2d 380 (2014) ("Certainly, a variety of permissible land uses may be excluded or restricted by local ordinance provided the ordinance is reasonable, and we do not concern ourselves with the wisdom or desirability of such legislation. . . . Accordingly, the presumption of constitutionality favors the ordinance's validity, and we may not second-guess the City's policy judgment in enacting it."). If a municipality chooses for policy reasons to pay more than is absolutely necessary for a project, it has the constitutional authority to do so.

Hawkins v Common Council of City of Grand Rapids, 192 Mich 276, 283-284, 158 NW 953 (1916), also reflects this Court's recognition of the distinction between local matters and matters of state policy. In *Hawkins*, the plaintiff challenged the authority of the city council to remove him as treasurer. He argued the authority was not specifically granted to the city in the state constitution. In rejecting this claim the Court explained:

> "***It is evident that no power is given cities and villages to remove their officers under said section 8 of the old Constitution, but it does not follow that they had no such power***. Their officers are corporate, legislative officers, not constitutional. The power to remove their officers is, and was long before the adoption of our Constitution, inherent in municipal corporations. . . . There were cities and villages in Michigan before it became a state-municipalities for local government of common-law origin and with common-law rights, self-governing communities in matters of strictly local concern. The Constitution of 1850 in dealing with this subject and authorizing the Legislature to 'provide for the incorporation of cities and villages nowhere prohibits the Legislature from conferring the power in question, but as a whole the constitutional provisions upon the subject give reason for inference to the contrary. The intended limitations are well defined and powers granted in general terms."

Id at 283-284. (Emphasis added).

It was again Justice Cooley, however, who made the most eloquent statement that explains why *Lennane* was wrongly decided and why its rationale must be rejected. In *People ex rel Bd of Detroit Park Comm'rs v Detroit Common Council*, 28 Mich 228, 230 (1873), the Supreme Court was called upon to decide the authority over the acquisition of public park land as between the Detroit Common Council and the legislatively created Board of Park Commissioners. The act relating to public parks for the City of Detroit, *Laws* 1873, Vol. 2, p. 100, permitted the Board to "acquire by purchase" lands not exceeding $300,000.00 in cost. The act further provided that whenever the Board located an appropriate site for a park and made the location known to the common council, the common council was required to provide money for the purchase of the property by the issue and sale of city bonds. The Board was given unfettered discretion and unrestricted power in the location of the park and in determining the amount of debt the city was required to incur for the purchase. *Id* at 231-232.

The Board reported to the common council on August 13, 1873, that it had located the site of a public park on Jefferson Avenue containing about four hundred and fifty acres; that it had purchased three hundred and seventy-five acres of the four hundred and fifty selected, at a cost of $229,140.14, and estimated the cost of acquiring the remainder at about seventy thousand dollars. The Board made demand that the common council authorize the issue of bonds to an amount not exceeding three hundred thousand dollars, to pay the cost. The common council refused to approve the bonds. The Board applied to the Supreme Court for a writ of mandamus commanding the common council to provide

money in the amount of three hundred thousand dollars for the purpose of purchasing the Jefferson Avenue site by the issuance and sale of city bonds in compliance with the provisions of the act. *Id* at 232-233.

Justice Cooley, writing for the Court first posed exactly what the Board was requesting the Court do: ". . . coerce the city of Detroit into entering into contracts involving a debt for a very large sum for an object purely of local concern, which the legislative body of the city has refused to make." *Id* at 233. Justice Cooley then wrote: "The proposition that there rests in this or any other court the authority to compel a municipal body to contract debts for local purposes against its will, is one so momentous in its importance, and so pregnant with possible consequences, that we could not fail to be solicitous when it was presented that its foundations should be thoroughly canvassed and presented, and that we might have before us, in passing upon it, all the considerations that could be urged in its support." *Id* at 233-234.

In holding the statute invalid the Court made several holdings directly relevant to the issue presented in this case.

"In all matters of general concern there is no local right to act independently of the State; and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation to the support of the State government, or assist when called upon to suppress insurrections, or aid in the enforcement of the police laws. Upon all such subjects the State may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment." *Id* at 236.

However, the Court then stated: "But we also endeavored to show in *People v. Hurlbut,* that though municipal authorities are made use of in State government, and as such are under complete State control, they are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the State at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens." *Id.*

The Court reiterated that "municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in State government." *Id* at 238.

Finally, Justice Cooley expounded on the dangers of allowing the state to interfere with matters of local concern:

> Whoever insists upon the right of the State to interfere and control by compulsory legislation the action of the local constituency in matters exclusively of local concern, should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify on principle, a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the State, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase, and how it shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens. . . . All such matters are left to those whose interests will prompt them to act with prudence, and who, because of their interest, and because they relate to matters that must come

> under their own view and observation, they are presumptively best qualified to decide upon.

Id at 241-242.

Based on these numerous authorities it is difficult, if not impossible, to discern why the *Lennane* Court chose to strike out on a new path in the state/municipal relationship. The essential question the *Lennane* Court was called upon to answer was this: Does the state have the authority to interfere with a municipality's decision of how it spends its public fisc on matters of local concern? Stated in the affirmative, the question was this: Does a municipality have the authority to decide how it chooses to spend its own fisc? The Court never actually considered those questions so never answered them. Instead, the Court made a judgment the rationale and wisdom of the provision was suspect ("The record is quite convincing that the city itself has failed to differentiate between an 'emergency' and a convenience, and has quite uniformly failed to limit a day's work to eight hours; it is also quite convincing that the laborers of Detroit prefer a 10-hour day with its added compensation to an 8-hour day. The record also establishes without dispute that the enforcement of the charter provisions and ordinances will add from 10 to 30 per cent. to the cost of all public work in the city."), *Lennane, supra*, at 635 and then struck the provision as attempting to set state policy. By doing so, the Court avoided having to answer questions it could not answer in the way that would justify the outcome it desired. The Detroit provision did not set state policy. Rather it addressed that most basic of "purely local" concerns: how shall we spend our money?

That the city was not attempting to set state policy is also evident from the fact the state had taken no action in the field. At the time of Detroit's action there was no state statute prohibiting minimum wages in governmental contracts at any level of government. The Legislature was completely silent on the issue. How one city's policy affecting only those that contract with that city could be said to constitute state policy is a complete mystery.

It will probably be argued that because the prevailing wage provision could apply to businesses not located in Detroit (or in our case, Lansing), the provision is not a matter of "pure local concern." This is a specious argument. In the first place, no one has a right to do work for a governmental entity. ("It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt . . ." *Atkin, supra,*191 U.S. at 222.); ("a contractor that submits the lowest bid cannot bring a cause of action against the municipality when its bid is rejected, even when the municipality has adopted a charter provision that requires it to accept the 'lowest responsible bidder,'" *Cedroni Ass'n, Inc v Tomblinson, Harburn Associates, Architects & Planners Inc*, 492 Mich 40, 46, 821 NW2d 1 (2012). The prevailing wage provisions apply only to those that choose to submit bids to the municipality. There is nothing coercive about the provision. If a business does not want to comply with the prevailing wage provision it is under no compulsion to submit a bid.

Additionally, as has been discussed above, a matter can be one of "local concern" even if it has some impact outside the municipal boundaries. The park that would have been purchased in *Bd of Detroit Park Comm'rs, supra,* would have been available for any

citizen to use, not only Detroit residents. The cases addressing wages are on the same footing. Wages earned in a city are spent in many places outside that city. There are few, if any, matters that are truly of "purely" local concern. Perhaps the *name* of a street or a municipal park would fall within such a definition. However, anything of an economic nature will have a ripple effect far beyond a city's boundaries. That fact does not prevent a municipality from acting in the area of its own economy.

3. Precedent Relied on by *Lennane*.

Lennane relies on several precedents that do not stand for the cited proposition. The Court first cited the United States Supreme Court's dicta in *Atkin, supra*, that described Dillon's Rule, and in fact cited *City of Clinton v Cedar Rapids & MRR Co*, 24 Iowa 455, 465 (1868), where Chief Justice Dillon of the Iowa Supreme Court first announced Dillon's Rule. Not only had Michigan repudiated Dillon's Rule, but the actual holding in *Atkin* was to ***uphold*** a Kansas statute that was remarkably similar to the Detroit charter provisions considered in *Lennane*. The Kansas statute provided for both a limitation on the hours worked and required a prevailing wage be paid. These provisions applied not only to state and local governmental employees but also to the employees of those who contracted with the state or its municipalities:

> provided further, that not less than the current rate of *per diem* wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, and other persons so employed by . . . contractors or sub-contractors in the execution of any contract or contracts within the state of Kansas, or within any county, city, township, or other municipality thereof shall be deemed to be employed by or on behalf of the state of Kansas or of such county, city, township, or other municipality thereof.

Atkin, 191 U.S at 207-208. In rejecting a constitutional challenge to the statute the Supreme Court held: "But it is equally true-indeed, the public interests imperatively demand-that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution. It cannot be affirmed of the statute of Kansas that it is plainly inconsistent with that instrument; indeed, its constitutionality is beyond all question." *Id* at 223-224. The dicta from *Atkin* cited by the *Lennane* Court did not accurately state Michigan policy and was completely irrelevant to the ultimate outcome of the case.

The *Lennane* Court also cited dicta from *City of Kalamazoo v Titus*, 208 Mich 252, 260, 175 NW 480 (1919), questioning the basic authority of municipalities to act. *Titus* dealt with a claim of implied authority. The city argued the constitutional provision giving it authority over its streets also gave it the authority to set rates of utilities located in the rights of way. The Supreme Court rejected the argument. "The contention made in respect to the power to fix the price of gas is, as has been pointed out, based upon the rather plenary grant of power to provide for the use, regulation, and control of streets. But the fixing of a compulsory price for gas cannot be reasonably referred to use, regulation, or control of streets. ***The gas company derives its right to make and sell gas, not from the city, but from the state***." *Id* at 266. (Emphasis added).

The *Lennane* Court also relied on *Clements v McCabe,* 210 Mich 207, 216, 177 NW 722 (1920), which held cities do not have an inherent right to enact a zoning ordinance. In response, the Legislature passed two acts: Act 207 and Act 348 of Public

Acts of 1921, approved on May 17 and May 18, 1921, respectively. The first, 1921 P.A. 207, the CVZA, established the statutory zoning scheme in detail. It included the extent and limits of municipal zoning power and the procedures under which municipalities could exercise that power. The second, 1921 P.A. 348, amended the Home Rule Act and authorized cities to provide themselves with zoning powers in their charters. *Adams Outdoor Advertising, Inc v City of Holland*, 463 Mich 675, 682-683, 625 NW2d 377 (2001).

While it is true *Clements* refused to recognize an inherent right to zone, it is equally true *Clements* conflicted with this Court's earlier decision in *Churchill v Common Council of City of Detroit*, *supra,* where the Court upheld a zoning ordinance that restricted the location of saloons under the city's police power authority. *Clements,* as did *Lennane*, also ignored decades of precedent recognizing a municipality's inherent police powers.

The holding in both *Clements* and *Lennane* appears to be result oriented, rather than an application of established precedent. The significance of the jurisprudence of the era cannot be overstated. This was a time when the courts of the nation were acting as super-legislatures, passing on the wisdom of economic regulations and, for the most part, finding it lacking. As a result, multitudes of state and local legislative enactments were struck down by the sword of "economic liberty." This explains the radical departure *Clements* and *Lennane* took from well-established precedent. Based on an objective legal analysis, however, *Lennane* does not withstand scrutiny.

D. *Lennane* Defies Practical Workability.

In *Sington v Chrysler Corp*, 467 Mich 144, 162, 648 NW2d 624 (2002), the Court explained the relationship between the undue hardship prong and the practical workability prong of the *stare decisis* analysis. "We must consider whether overruling a prior erroneous decision would work an undue hardship because of reliance interests or expectations and, conversely, whether the prior decision defies 'practical workability.' *Robertson, supra* at 757; *Robinson, supra* at 466." In this case the "practical workability" of *Lennane* is not a significant factor, primarily because it has been repudiated by this Court's subsequent holdings and, as a result, largely ignored. To the extent plaintiff is attempting to resurrect *Lennane*, its holding would defy practical workability.

The holding in *Lennane* is that a local economic regulation constitutes the creation of state policy. In today's society, political environment and legal environment an attempt to enforce that holding would result in chaos and would be completely unworkable. As a practical matter, there is nothing dealing with the economy that is "purely local" in nature. The advances in travel technology and communications technology make this a different world than the one that existed when *Lennane* was decided. Does that mean Michigan municipalities are powerless to enact legislation that impacts the economy? Clearly not. Yet, if *Lennane* is resurrected and its holding applied, that would be the result. This is not simply an issue of addressing a prevailing wage enactment in a vacuum. *Lennane* held that Detroit's prevailing wage provision was an attempt to set state policy. If a prevailing wage ordinance is an attempt to set state policy, what local economic regulation is not? If Lansing's prevailing wage ordinance is infirm under the

Lennane holding, what local economic regulation would survive? The inescapable answer would appear to be "none." *Lennane* defies practical workability.

E. Reliance Interests in *Lennane* Are Minimal And *Lennane* Has Not Become So Fundamental to Everyone's Expectations That to Change It Would Produce Practical Real-World Dislocations.

There has been no reliance on *Lennane* to the extent anyone would have to fundamentally alter their behavior if *Lennane* were overruled. There would be no "real-world dislocations" if *Lennane* ceased to exist. This is unequivocally demonstrated in two ways. First, contrary to ABC's parade of horribles, there would be virtually no change in the manner in which contractors do business. Computer programs could easily track the various locations employees are assigned, and make necessary changes in their compensation (if any is required), literally at the touch of a button – or the click of a mouse. More to the point, both the United States and the State of Michigan have prevailing wage statutes currently in place: The Davis-Bacon Act, 40 USC § 3141 *et seq*, and the Michigan Prevailing Wage Act, MCL 408.551 *et seq*. Contractors have apparently been able to navigate the requirements of these two statutes without the industry breaking down. Since the Michigan statute incorporates the U.S. Department of Labor's standards for determining the "prevailing wage," and since the Lansing ordinance also relies on the Department of Labor standards ("laborers so employed shall receive at least the prevailing wages and fringe benefits for corresponding classes of mechanics and laborers, as determined by statistics compiled by the United States Department of Labor and related to the Greater Lansing area by such Department."), it is

difficult to conceive of the practical hardship ABC claims would result from compliance with the City of Lansing ordinance.

The other reason we can confidently say the existence of a local prevailing wage ordinance would not result in widespread chaos and the disintegration of the construction industry is this: several local prevailing wage ordinances are currently in effect. The following municipalities have either a prevailing wage ordinance or a living wage ordinance in place:

- City of Kalamazoo. § 2-125 ("the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of character similar to the contract work in or in the vicinity of the City.")
- City of Ann Arbor, Chapter 23, 1:185(1) ("Every contractor/vendor or grantee, as defined in 1:183 shall pay its covered employees a living wage as established in this section.")
- City of Battle Creek, 208.09 ("No project, in an initial amount of fifty thousand dollars ($50,000) or more for the performance of services or work for and on behalf of the City, involving craftsmen, mechanics and laborers employed directly upon the site of the work, shall be entered into, approved or executed unless a contract, agreement, understanding or arrangement provides and requires that all craftsmen, mechanics and laborers so employed are to be paid not less than the wages and fringe benefits prevailing in the locality of the building trades industry for corresponding

classes of craftsmen, mechanics and laborers, as published as of the time of execution of the contract by the Michigan Department of Labor and Economic Growth . . .")

- Ypsilanti Township, Article VI, Division 4, § 2-210(c)(1) ("Every contractor or grantee, as defined in subsection (a), shall pay its covered employees a living wage as established in this section.")
- City of Taylor, Article V, Division 2, § 2-346 ("The city shall not enter into any contract for services with any contractor or provide any grant to a grantee who does not demonstrate that it pays its work force a living wage. The contractor or grantee shall be required to maintain this rate of pay for the duration of the contract or grant period.")
- City of Eastpointe, Article VI, Division 3, § 2.574 ("The city shall not enter into any service contract with any contractor or provide any grant to a grantee who does not demonstrate that it pays its work force a living wage. The contractor or grantee shall be required to maintain this rate of pay for the duration of the contract or grant period.")
- Pittsfield Township, Chapter 21, §21-104 A ("Subject to the provisions of this section 21-104, every covered employer as defined in subsection 21-102 D., shall pay its covered employees a living wage as established in this chapter.")

This is a representative sample from across the state. These municipalities are responsible for expending millions of dollars a year on construction projects. The

contractors have managed to comply with the prevailing or living wage ordinances without incident. Resurrecting Lennane would have a greater disruptive effect that overruling what is a dead precedent.

F. Changes to the 1963 Constitution No Longer Justify *Lennane's* Rationale or Holding.

Michigan's original constitution, the Constitution of 1835, had no specific provisions regarding municipalities.

The Constitution of 1850 added Article IV, Section 38: "The Legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local, legislative and administrative character as they may deem proper."

The Constitution of 1867 contained an identical provision in, Article V, Section 26: "The Legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local, legislative and administrative character as they may deem proper."

The 1873 Constitution contained a nearly identical provision in Article IV, Section 32: "The legislature may confer upon organized townships, incorporated cities and villages, and upon the board of supervisors of the several counties, such powers of a local, legislative and administrative character as it may deem proper."

The 1907 Constitution added Article VIII entitled "Local Government." Section 21 stated: "Under such general laws, the electors of each city and village shall have power to frame, adopt, and amend its charter, and, through its regularly constituted

authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this state.

The 1963 Constitution contains two provisions that specifically address the authority of cities in the State of Michigan. Constitution 1963, art 7, § 22 grants broad authority to cities:

Sec. 22. Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of power granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

Additionally, Constitution 1963, art 7, § 34, requires the constitution and laws concerning cities be liberally construed:

Sec. 34. The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

The Legislature has also recognized the constitutional authority given to cities. The Home Rule City Act, MCL 117.1, *et seq* grants further extensive authority to cities to deal with their "municipal concerns." For example, MCL 117.4i states that each city may

provide in its charter for: "(d) the ***regulation of trades, occupations***, and amusements within city boundaries, if the regulations are not inconsistent with state or federal law, and the prohibition of trades, occupations, and amusements that are detrimental to the health, morals, or welfare of the inhabitants of that city." (Emphasis added). MCL 117.4j(3) provides:

Municipal powers. For the exercise of all municipal powers and the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; ***for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants*** and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state. (Emphasis added).

Contrary to ABC's position, the broad grant of authority to cities is all encompassing, limited only by statutory or constitutional ***restrictions***. In Paragraph 14 of its Complaint Plaintiff alleges: "In order for there to be an effective delegation of any part of the State's police power, there must be an expressed delegation of that power either in the constitution or by the legislature." Similar allegations are made in paragraphs 17, 18 and 19 of Plaintiff's Complaint. This position is completely unsupported by Michigan law.

The explicit language of the Constitution defeats the Plaintiff's position. Constitution 1963, art 7, § 22 states in part: "No enumeration of power granted to cities and villages in this constitution shall limit or restrict the general grant of authority

conferred by this section." In other words (although the language of the Constitution is crystal clear and no other words are really required to explain it), a city need not have an explicit ***grant*** of authority to undertake any particular action; rather, cities have all powers not explicitly ***withheld***. Constitution 1963, art 7, § 22 is the Michigan Constitution's counterpart to the Tenth Amendment of the United States Constitution which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Just as the Tenth Amendment reserved to the states all authority not ceded to the federal government or explicitly prohibited to the states by the Constitution. So too, art 7, § 22 reserves to the cities all powers not explicitly prohibited. There is nothing in the Constitution or state statutes that prohibits cities from enacting a prevailing wage ordinance.

This Court made that very point in *Rental Property Owners Association of Kent County v City of Grand Rapids*, 455 Mich 246, 253, 566 NW2d 514 (1997: "The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police power ***as long as the ordinance does not conflict with the constitution or general laws***." (Emphasis added). This Court further stated: "[t]he home rule city act is intended to give cities a large measure of home rule. It grants general rights and powers ***subject to enumerated restrictions***." *Id* at 254 (Emphasis added). The City of Lansing unquestionably has constitutional authority to enact an ordinance related to how the City spends its own fisc so long as that ordinance is not in conflict with the constitution or laws of the state.

ABC characterizes the changes from the 1908 Constitution to the 1963 Constitution to be trivial and unimportant. That is obviously not accurate. Not only were the home rule powers of cities recognized and bolstered in art 7, §22, but the addition of art 7, § 34 – requiring the constitution and laws concerning cities be liberally construed – was completely new. This change cannot be ignored or dismissed as trivial. The addition of an entirely new section of the constitution requiring a liberal construction of the authority of cities is a significant change and one that cannot be ignored. Cities are no longer "creatures of the state" whose existence can be extinguished by the whim of the legislature. Cities are constitutional entities that enjoy not only constitutional authority, but a liberal understanding of the additional powers given them by the Constitution and the Legislature.

Additionally, the enactment of both a federal and state prevailing wage ordinance reflect the city's enactment is the implementation of a mainstream economic doctrine at the local level. When Lennane was decided neither the state nor the United States had enacted a prevailing wage ordinance. The City of Detroit's ordinance was undoubtedly viewed as extremely progressive and not in keeping with the prevailing economic theories of the day. That is plainly no longer the case, and the backdrop behind *Lennane* is no longer present.

ABC seeks to return to the halcyon days (in its view) of the *Lochner* era reflected by the *Lennane* decision when the courts put economic liberty above all else, including the police power of the municipalities to legislate for the benefit of the public's health, safety and welfare. ABC wants to turn back the clock to the 1920s and claim the cities in

this state have only those powers explicitly delegated to them by the state. The 1963 Constitution puts to rest any suggestion that is the law.

ABC also argues the Legislature's failure to amend the HCRA reflects its view that *Lennane* was correctly decided. This is simply not a tenable argument. "First and foremost, legislative acquiescence has been repeatedly repudiated by this Court because it is as an exceptionally poor indicator of legislative intent." *McCahan v Brennan*, 492 Mich 730, 749, 822 NW2d 747 (2012). That is especially true in this case. Prevailing wage ordinances were not prevalent in the 1920s, unlike zoning ordinances which prompted a legislative response to *Clements, supra*. Once the 1963 Constitution was ratified with its clear statement on the expansion of municipal authority, there would no longer have been any need to amend the HCRA to explicitly allow municipalities to enact prevailing wage ordinances. Legislative silence on this issue is irrelevant.

II. THE CITY OF LANSING'S PREVAILING WAGE ORDINANCE WAS PROPERLY ENACTED UNDER AUTHORITY OF THE MICHIGAN CONSTITUTION AND THE HOME RULE CITY ACT.

This Court directed the parties to address the following question: "what authority, if any, enabled defendant to enact its prevailing wage ordinance."

The answer to this question, as demonstrated by the discussion on why *Lennane* should be formally overruled, is the city enacted the prevailing wage ordinance under its constitutional and statutory authority.

To reiterate, this Court has explicitly held "[t]he home rule city act is intended to give cities a large measure of home rule. It grants general rights and powers ***subject to enumerated restrictions***." *Rental Property Owners Association, supra,* at 254 (Emphasis added). Further, in *Detroit v Walker,* 445 Mich 682, 690, 520 NW2d 135 (1994) and *American Federation of State, County & Municipal Employees v City of Detroit*, 468 Mich 388, 410-411, 662 NW2d 695 (2003), this Court unequivocally held the expansive police powers possessed by this state's municipalities. "Home rule cities enjoy not only those powers specifically granted, but they may also exercise all powers not expressly denied." There can be no question the prevailing wage ordinance is within the purview of the police power. The only other question to resolve, then, is whether the ordinance conflicts with state law on the subject. It clearly does not.

There is no provision in the Michigan Constitution that prohibits cities from enacting an ordinance such as Lansing's prevailing wage ordinance. Moreover, there is no statute prohibiting such an ordinance. As previously discussed, the State of Michigan itself has enacted a prevailing wage statute mirroring the federal Davis-Bacon Act. The city's prevailing wage ordinance does not conflict with or contravene the state prevailing wage act. The state prevailing wage act does not apply to projects initiated by the City because the state statute excludes cities from the definition of "contracting agent." Instead, the City's prevailing wage ordinance *complements* the state act requiring a prevailing wage.

The city's prevailing wage act reflects the same public policies this Court recognized in *Western Michigan University Board of Control v State of Michigan*, 455

Mich 531, 535, 565 NW2d 828 (1997): remedy the labor strike, broken contracts and inferior workmanship that sub-standard wages engendered. The City's ordinance, like the federal and state acts seek to protect employees from sub-standard wages. The fact the state and federal governments have seen to fit to act in this area does not prohibit the City from acting. Whether these goals will actually be achieved by the ordinance is not the issue. The point is the City of Lansing has the authority to enact such an ordinance under its police powers.

ABC makes no claim of preemption. Rather, its position seems to be the city may not act in an area where the state has acted. The logical extension of this argument is that any time the state has legislated in an area a municipality is prohibited from acting in the same area. History demonstrates this position is not viable.

The fact that wages are the focus the City of Lansing ordinance does not preclude the City from taking action. While every purely local action is by definition a matter of municipal concern, it does not follow that matters of municipal concern are limited to those matters that are purely local in nature.

In *McNeil v Charlevoix County*, 275 Mich App 686, 696, 741 NW2d 27 (2007) *aff'd,* 484 Mich 69, 772 NW2d 18 (2009), both the Court of Appeals and this Court held a county could regulate smoking in county buildings to a greater degree than the state's Clean Indoor Air Act. The Court of Appeals rejected plaintiffs' assertion that the Northwest Michigan Community Health Agency (NMCHA) was without authority to promulgate the regulations.

NMCHA is a district health department organized by Antrim, Charlevoix, Emmet, and Otsego counties under Part 24 of the Public Health Code (PHC), MCL 333.2401 *et seq.* Relying on its duty to protect the public health and welfare in its district, the NMCHA promulgated what it entitled the Public Health Indoor Air Regulation of 2005. In addition to prohibiting smoking in all public places, the regulation required employers who did not wholly prohibit smoking at an enclosed place of employment to designate an NMCHA-approved smoking room, which was required by the regulation to be "a separate enclosed area that is independently ventilated so that smoke does not enter other non-smoking areas of the worksite." After the regulation was approved by each of the four counties, plaintiffs, each of whom resided or operated a business in Charlevoix County, brought an action to invalidate the regulation on the basis that the NMCHA was without authority to promulgate such a regulation. Plaintiffs argued that nothing in Part 126 of the PHC, which is also known as the Michigan Clean Indoor Air Act (MCIAA), authorized a local health department to enforce or augment the smoking restrictions established by the MCIAA. *Id at* 689-690.

In affirming, this Court held the only limitation placed by the legislature on the promulgation and adoption of local regulations was that they "be at least as stringent as the standard established by state law applicable to the same or similar subject matter." MCL 333.2441(1) . *McNeil v Charlevoix County*, 484 Mich 69, 77, 772 NW2d 18, 23 (2009).

CONCLUSION

The entire underpinning of the *Lennane* decision was based on a constitutional framework that was changed in 1963. This Court has recognized that change. The constitutional underpinnings have been significantly altered since *Lennane* was decided, and those alterations have been recognized by recent decisions of this Court. Those decisions construing the 1963 Constitution control this issue, not a decision nearly 90 years old based on a Constitution that has been replaced and altered.

The citizens of the City of Lansing have a right recognized and protected by our Constitution to legislate on issues of local concern through their elected representatives. They have chosen to spend their money, in part, on labor costs at prevailing wage levels. They are entitled to do so. If this decision is unwise or falls out of favor with the citizens, the remedy is that most cherished of American institutions: the ballot box. This Court has recognized this is the proper remedy for those dissatisfied with an enactment. "Let us state the proposition as clearly as may be: It is not our function to approve the ordinance before us as to wisdom or desirability. ***For alleged abuses involving such factors the remedy is the ballot box, not the courts***. We do not substitute our judgment for that of the legislative body charged with the duty and responsibility in the premises." *Robinson v City of Bloomfield Hills*, 350 Mich 425, 431, 86 NW2d 166 (1957). *People v McIntire*, 461 Mich 147, 159, 599 NW2d 102 (1999), made the same point very clearly: ". . . in our democracy, a legislature is free to make inefficacious or even unwise policy choices. The correction of these policy choices is not a judicial function as long as the legislative choices do not offend the constitution. Instead, the correction must be left to the people

and the tools of democracy: the "ballot box, initiative, referendum, or constitutional amendment."

It is ironic ABC ***seeks*** state governmental interference with a municipality's right to determine how best to address its local needs, yet at the same time ***challenges*** the federal government's "interference" with matters of state and local concern. "Many employees are being hurt by lost wages and hours because the 30 hours per week definition in the Affordable Care Act (ACA) is forcing employers to restructure their workforce by reducing their employees' hours to alleviate the burden of compliance." (ABC's letter to U.S. Senators regarding the Affordable Care Act). http://www.abcmi.com/News/MeritMinuteNewsletter/tabid/5204/entryid/3188/abcmi-support-40-hour-work-week-definition.aspx

The citizens of the City of Lansing, not outside special interest groups, are entitled to determine how to spend the city's fisc.

RELIEF REQUESTED

The City of Lansing respectfully requests this Court affirm the decision of the Michigan Court of Appeals upholding the Lansing Prevailing Wage Ordinance and formally overrule *Attorney General ex rel Lennane v. City of Detroit*.

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Dated: March 10, 2015

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

ASSOCIATED BUILDERS
AND CONTRACTORS,

Plaintiff-Appellant,

v Docket No. 149622

CITY OF LANSING,

Defendant-Appellee.
_____/

CERTIFICATE OF SERVICE

Michael S. Bogren, Attorney in the firm of Plunkett Cooney, being first duly sworn, deposes and says that on the 10th day of March, 2015, he caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the Michigan Supreme Court filing, and via U.S. mail to any counsel not registered to receive electronic copies from the Court, by enclosing same in a sealed envelope with first class postage prepaid.

DATED: March 10, 2015

PLUNKETT COONEY

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